[Cite as *In re J.M.*, 2010-Ohio-4465.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

J. M.

ALLEGED DELINQUENT CHILD

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 10CA07

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2071344

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: September 21, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Farmer, J.

{¶1} On August 22, 2005, appellee, J. M., was adjudicated a delinquent child via a charge of gross sexual imposition in violation of R.C. 2907.05 (Case No. 2051013). In lieu of a commitment to the Department of Youth Services, the trial court placed appellee into a sexual offender intervention program at the Village Network in Smithville, Ohio.

{¶2} During his placement with Village Network, appellee underwent counseling with Rhonda Wilson-Mullet, a clinical therapist. Appellee made certain disclosures to Ms. Wilson-Mullet concerning the sexual abuse of others in the past. Ms. Wilson-Mullet reported the admissions to appellee's probation officer.

{¶3} On October 30, 2007, a complaint was filed charging appellee with rape in violation of R.C. 2907.02. On January 11, 2008, appellee filed a motion to suppress his admissions made to Ms. Wilson-Mullet. A hearing was held on February 28, 2008. By journal entry filed March 5, 2010, the trial court granted appellee's motion to suppress.

{¶4} Appellant, the state of Ohio, filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED WHEN IT CONCLUDED AS A MATTER OF LAW THAT THE CIRCUMSTANCES OF J. M.'S CONFESSION CREATED A 'CLASSIC PENALTY' SITUATION VIOLATING HIS FIFTH AMENDMENT RIGHTS AND REQUIRING SUPPRESSION."

II

{¶6} "THE TRIAL COURT ERRED WHEN IT CONCLUDED AS A MATTER OF LAW THAT J. M.'S CONFESSION WAS INVOLUNTARILY OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE."

I

{¶7} Appellant claims the trial court erred in granting appellee's motion to suppress his statements made to his counselor at a court-ordered residential treatment facility. Specifically, appellant claims the trial court erred in concluding that as a matter of law, the circumstances of appellee's confession created a "classic penalty" situation under the Fifth Amendment to the United States Constitution. We agree.

{¶8} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's

conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶9} In its journal entry filed March 5, 2010, the trial court concluded the following:

{¶10} "While it is a close question, the Court believes that Mr. [M.] was required, as a condition of his court ordered therapy to disclose his past sexual misconduct. He needed to do this to progress in the program and he needed to progress in the program to stay out of the Department of Youth Services. This created a 'classic penalty' situation where his Fifth Amendment rights were self-executing. While it is true that his counselor was not a law enforcement officer and not obligated to give him Miranda warnings, the confession he gave is still unconstitutionally compelled under the Fifth Amendment and under the totality of the circumstances, involuntarily given in violation of the Due Process Clause."

{¶11} In *State v. Evans* (2001), 144 Ohio App.3d 539, 556, our brethren from the First District noted the following:

{¶12} "In *Minnesota v. Murphy* [(1984), 465 U.S. 420], a probationer argued that since revocation of his probation had been threatened if he was not truthful with his probation officer, he had been compelled to make incriminating disclosures instead of asserting his constitutional privilege against self-incrimination. The United States

Supreme Court ultimately concluded that there was no inherent threat in the requirement that Murphy be truthful with his probation officer."

{¶13} The *Minnesota* court at 434, explained the following:

{¶14} "The threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony. A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution."

{¶15} As explained in *Evans* at 557-558, there are three issues that define the limits of a "classic penalty" situation:

{¶16} "But other courts have had the occasion to define the limits of the 'classic penalty' situation. Where (1) the treatment program has been deemed voluntary because it is a condition of initial parole eligibility, (2) the penalty is insubstantial because the resultant facility transfer is to another medium-security prison and therefore essentially lateral, and (3) the denial of parole does not automatically follow from a

refusal to speak, then although the defendant's constitutional privilege has admittedly been burdened, the burden is held to be sufficiently mitigated."

{¶17} In light of these three issues, we will address the facts sub judice. We note that the facts are essentially uncontested by both parties.

{¶18} The following facts are listed in the trial court's March 5, 2010 journal entry:

{¶19} "1. On or about July 9, 2007 during the course of a therapeutic program, [J. M.] made statements to his counselor, Ronda Wilson-Mullet, indicating that he had raped a child by the name of [J. P.]

{¶20} "2. This information was reported to Mr. [M.'s] Knox County Probation Officer and to his social worker employed by the Knox County Department Job and Family Services.

{¶21} "3. Based on this information a Rape charge was filed October 30, 2007 under the above captioned case number.

{¶22} "4. At the time he made these incriminating statements Mr. [M.] was in a sexual offender intervention program operated by the Village Network at their main campus in Smithville, Ohio.

{¶23} "5. Mr. [M.] had previously been adjudicated for a separate sexual offense involving his sister and had been placed in the Village Network program by the Court as an alternative to a commitment to the Department of Youth Services.

{¶24} "6. In 2007 Ms. Wilson-Mullet was a certified counselor and an employee of the Village Network. She was not a law enforcement officer nor was she taking any

action at the request of a law enforcement officer or acting as an agent of law enforcement.

{¶25} "7. As a counselor/social worker Ms. Wilson-Mullet had a duty pursuant to Section 2151.421 of the Ohio Revised Code to report any incident of suspected child abuse to either the public children services agency or to a municipal or county peace officer in the county where the child resides.

{¶26} "8. Ms. Wilson-Mullet testified that she tells all of her clients that she is a mandatory reporter and the 'Consent to Treat Agreement' they all sign clearly states the mandatory reporting requirements of the social workers and counselors who work at the Village Network.

{¶27} "9. Ms. Wilson-Mullet did not give Mr. [M.] any Miranda warnings prior to the incriminating statements he made which are the subject of the pending Motion to Suppress.

{¶28} "10. Mr. [M.] was placed in the Village Network program by Court Order. He was not free to leave the program or to come and go as he pleased.

{¶29} "11. Mr. [M.] was advised by the Court, on more than one occasion, that he needed to be successful in the Village Network program because the only other option available to the Court was a placement in the Department of Youth Services.

{¶30} "12. The sexual offender intervention program at the Village Network had a level system. Youth who were compliant and followed the rules were promoted. Promotion to a higher level brought rewards such as off campus visits with parents.

{¶31} "13. The failure of Village Network clients to disclose past misconduct did not result in direct punishment but it did hamper or delay promotion to the next level in the system.

{¶32} "14. Disclosure of all past sexual misconduct was encouraged in this program as it is in most sexual offender intervention programs. Ms. Wilson-Mullet stated that if clients withhold information they won't get all the help they need."

{¶33} Absent from the trial court's findings are two critical facts: 1) the counselor never stated that non-disclosure would result in detention at the Department of Youth Services, and 2) appellee specifically requested to speak to the counselor about disclosing some information that he needed "to get it off of his chest." T. at 11, 29. In addition, during the course of treatment, disclosure of other abuse victims was mentioned and discussed, but not pushed. T. at 34. Disclosure of previous incidents was not a prerequisite to successful participation in the program/therapy. T. at 37-38.

{¶34} Although arguable, the program was a part of the level advancement that determined whether appellee would stay at the residential facility or progress to a foster home/day treatment. Therefore, we conclude it was not voluntary. However, there was no penalty associated with non-disclosure of previous incidents aside from the sentencing court's admonishment to do well. Further, the ability to progress to outpatient and foster home treatment was not predicated on full disclosure.

{¶35} Under *Application of Gault,* (1967), 387 U.S. 1, a juvenile is to be placed on equal footing with all the privileges and rights of an adult.

{¶36} Given the specific facts of the disclosure in this case, we find this case is substantially different than *Evans* and does not qualify under the "classic penalty" theory of *Minnesota.*

{¶37} Assignment of Error I is granted.

II

{¶38} Appellant also claims the trial court's decision that appellee's statements were involuntary and violated the Due Process clause of the United States Constitution was error. We agree.

{¶39} "The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no person shall be 'deprived of life, liberty or property without due process of law.' Confessions that have been coerced by the state and therefore have been involuntarily given have long been held to violate this guarantee of due process." *Evans,* at 560.

{¶40} Although the trial court found the counselor was not a law enforcement officer, the trial court determined appellee's statements were involuntary. It is clear from the record that appellee was in a custodial situation and was not free to go. The trial court determined that because the counselor was found not to be a law enforcement officer, *Miranda* warnings were not required.

{¶41} The *Evans* court held at 553, "We therefore join other Ohio courts that have similarly held that those tangentially associated with the criminal justice system, but without the requisite statutory authority, are not law enforcement officials for the purposes of *Miranda.*"

{¶42} These facts, coupled with appellee's request to "get it off of his chest" apart from an actual counseling session, lead us to conclude the statements were voluntary.

{¶43} Assignment of Error II is granted.

{¶44} The judgment of the Court of Common Pleas of Knox County, Ohio is hereby reversed.

By Farmer, J.

Edwards, P. J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES

SGF/sg 810

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
J. M.	:	
ALLEGED DELINQUENT CHILD	:	JUDGMENT ENTRY
	:	CASE NO. 10CA07

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio, Juvenile Court is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES